UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KEVIN J. BRODERICK, JANIS E. CURRIE, MARY L. FOWLER, Appellants, v. DEPARTMENT OF THE TREASURY, Agency.	)	DOCKET NUMBERS DC07[illegible] 341 DC0[illegible]0352 DC07[illegible]0337 DATE: JAN - 7 1992

Kevin J. Broderick, Alexandria, Virginia, pro se; James T. Currie, Alexandria, Virginia, for appellant Janis E. Currie; Michael J. Riselli, Esq., Riselli & Pressler, P.C., Washington, D.C., for appellant Mary L. Fowler.

Rosa M. Koppel, Esq., and Myrrel C. Hendricks, Esq., Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

These appeals are before the Board on the appellants'[1] petitions for review of initial decisions that sustained the agency's actions reducing their grades and/or pay. For the reasons discussed below, we find that the petitions do not

[1] Because these appeals involve the same agency and identical jurisdictional issues, they are consolidated for review under 5 C.F.R. § 1201.36.

meet the criteria set forth at 5 C.F.R. § 1201.115, and we therefore DENY them. We REOPEN these appeals on our own motion under 5 C.F.R. § 1201.117, however, VACATE the initial decisions and DISMISS the appeals for lack of jurisdiction.

BACKGROUND

The appellants are all employees in the competitive service who are not serving probationary or trial periods under an initial appointment and have completed more than one year of current continuous service in other than a temporary appointment. They are all employed by the Office of the Comptroller of the Currency (OCC) in various positions and at various grades. They were reduced in pay and/or grade as the result of the agency's conversion to a new pay system, the "OC" pay system.[2] This change was the result of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183.

On August 9, 1989, Congress enacted FIRREA. The statute included provisions that empower OCC to set and adjust the salaries of all employees of the Office. In compliance with the statute, the Comptroller retained a consultant firm to develop a salary survey. A comparison was made of salaries at

[2]The agency reclassified appellant Broderick from his position as a CP-0343-09 Management Analyst with a salary of $72,100 to the same position at the OC-13 level with a salary of $56,400. The agency reclassified appellant Currie from her position as a CP-0235-05 Employee Development Specialist with a salary of $44,600 to the same position at the OC-10 level with a salary of $41,300. The agency reclassified appellant Fowler from her position as a CP-0510-10 Senior Staff Accountant for Financial Policy with a salary of $64,100 to the same position at the OC-14 level with a salary of $61,800.

other Federal banking agencies. As a result of the survey and a salary analysis, the salary scale of the appellants was reduced, and positions in the newly created grade scale were assigned. The agency provided the appellants salary retention for five years and grade retention benefits.

The appellants filed appeals of the agency's actions with the Board's Washington, D.C., Regional Office arguing the merits of the agency's actions. In response to the appeals, the administrative judge provided the appellants the opportunity to present evidence and argument with regard to the issue of Board jurisdiction. He noted that the record evidence did not indicate that the appellants had received any actual reductions in pay and that this, in turn, raised a question as to whether the Board had jurisdiction to consider the appeals. In its response to the jurisdictional order, the agency argued, *inter alia*, that the Board lacked jurisdiction to consider the appeals because the appellants had received retained pay for five years and certain grade retention benefits under its internal retention plan, and thus had not been affected by an action that is appealable to the Board.

In his initial decisions, the administrative judge sustained the agency's actions, finding that the Board had jurisdiction over the appellants' reductions in pay and grade despite the agency's efforts to grant them saved pay and grade under its internal retention plan. He reasoned that because the appellants are employees who are not entitled to grade retention under 5 U.S.C. § 5361, *et seq.*, they are entitled to

appeal to the Board if they have been affected by a reduction in grade. He found further that the agency established that it complied with the requirement of FIRREA, that in setting and adjusting the total amount of compensation and benefits for OCC employees the Comptroller shall consult with, and seek to maintain comparability with, other Federal banking agencies. Based upon this determination, the administrative judge found that he was not authorized to go behind the adverse actions to determine whether the positions were properly classified, as urged by the appellants, citing *Lomartere v. Department of Defense*, 4 M.S.P.R. 30, 32 (1980).

Each of the appellants filed a petition for review with the Board. The petitions take issue with the administrative judge's finding that OCC complied with FIRREA's pay setting provision and they also raise additional issues individual to their cases. None of the appellants, however, has made direct arguments on the authority of the Board to assert jurisdiction over these appeals, the issue we find dispositive.

ANALYSIS

We deny the appellant's petitions because, as noted, they have failed to make convincing arguments on jurisdiction, the sole issue we find relevant. We reopen these appeals to consider the administrative judge's findings on that issue. The Board's jurisdiction is limited to those matters over which it has been given jurisdiction by statute or regulation. *See Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 588-89

(1989). The administrative judge cited *Lomartere* for the proposition that employees who are not entitled to grade retention under 5 U.S.C. § 5361 *et seq.*, are entitled to appeal to the Board if they are affected by a reduction in grade.[3] He then concluded that the Board has limited jurisdiction over the appellants' reduction in grade and pay despite the agency's efforts to grant saved grade and pay under its internal retention plan.[4] The administrative judge thus found that although the appellants may in fact have received retained pay and grade, because they did not receive retained pay and grade under 5 U.S.C. Chapters 51 and 53, they were entitled to appeal to the Board. We find, however, that: (1) Because the appellants received retained pay and grade, they were not adversely affected and therefore have not established an adverse action under 5 U.S.C. Chapter 75; and (2) the source of the appellants' retained pay and grade benefits is not determinative of the question of jurisdiction.

Generally, the Board has jurisdiction under Chapter 75 to review actions involving reductions in grade and pay. *See* 5 U.S.C. § 7512(3) and (4). However, where a reclassification of an employee results in a reduction in pay and grade and the employee has received retained pay and

[3]We distinguish in part our decision in *Lomartere v. Department of Defense*, 4 M.S.P.R. 30 (1980), from the present appeals because in *Lomartere* there is no indication that the appellants received pay or grade retention of any kind.

[4]The administrative judge made the same finding and conclusions with reference to jurisdiction in each of the appeals. *See* Initial Decisions at 2.

grade, the employee has no appeal rights to the Board. *See Decker v. Department of Health & Human Services*, 40 M.S.P.R. 119, 131 (1989). In addition, the right to appeal reductions in pay and grade to the Board has been narrowly construed. *See Wilson v. Merit Systems Protection Board*, 807 F.2d 1577, 1581 (Fed. Cir. 1986). The Board has interpreted this authority to require that the appellant show a demonstrable loss, such as an actual reduction in pay, to invoke this authority. *See Russell v. Department of the Navy*, 6 M.S.P.R. 698, 707 (1981). In these appeals, although the agency effected actions reducing the appellants' grades and pay, the appellants suffered no adverse actions as contemplated under Chapter 75 because they suffered no loss of pay due to the agency's internal retention procedures.[5]

Moreover, the appellants suffered no reduction in grade because they did not show that they suffered an injury that is measurable and substantial in pay terms because they received retained pay,[6] and they did not show that they would be

[5]In each of the initial appeals, the agency submitted affidavits (the same affidavits for each appeal) stating that the appellants received retained pay and grade. *See, e.g.*, (DC07529110352) Initial Appeal File (IAF), Tab 26, Subtabs 1c and 1d.

[6]A reduction in grade may be determined on the basis of a loss of pay for employees subject to Chapter 51 and 53 because when they are moved between pay schedules, the determination of grade is made by comparison of the representative rates of the position. *See* 5 C.F.R. § 536.201. Thus, absent pay retention, the appellants would have suffered a reduction in grade. We note that if such a pay comparison were not made, it would be impossible to determine if their grades were reduced or increased when they moved to a different pay system. *Cf. Peele v. Department of Health & Human Services*, 6 M.S.P.R. 296

deprived of a substantial benefit such as a promotion because they received retention benefits including the right to compete for any promotion they could have competed for under the old classification system. *See Russell*, 6 M.S.P.R. at 709.

Under 5 U.S.C. § 5361, *et seq.*, employees who have been reduced in grade through no fault of their own are entitled to two years of retained pay and two years of retained grade. This statutory provision, however, does not apply to the appellants in these appeals. Title 12, Section 1202 of FIRREA, specifically excludes the appellants from coverage under 5 U.S.C. Chapter 51 (classification and grading) and subchapter III of 5 U.S.C. Chapter 53.[7] Section 1202 provides in pertinent part that:

> Notwithstanding any of the preceding provisions of this section to the contrary, the Comptroller of the Currency shall fix the compensation and number of, and appoint and direct, all employees of the Office of the Comptroller of the Currency. Rates of basic pay for all employees of the Office may be set and adjusted by the Comptroller without regard to the provisions of Chapter 51 or subchapter III of Chapter 53 of title 5, United States Code.

The administrative judge's finding that the statutory exclusion of Chapter 53 rights forms a basis for Board jurisdiction is error. In *Bosco v. Department of the*

(1981)(there is no reduction in grade where a position is moved from the GS schedule to a position that is not under a position classification system).

[7]Under 5 U.S.C. § 5361 *et seq.* (retained pay and grade), "employee" means an employee to whom chapter 51 of this title applies. Thus, because Chapter 51 does not apply to the appellants, they are not covered by the retained pay and grade provisions of 5 U.S.C. § 5361 *et seq.*

Treasury, 6 M.S.P.R. 471, 474 (1981), the appellants argued that because they received retained pay and grade benefits pursuant to supplemental regulations promulgated by OPM and not by statute, they had the right to appeal their reductions to the Board. The Board held that the fact that the appellants were covered by regulation rather than statute did not form a basis for jurisdiction. The Board stated "... it matters not at all whether appellants received the benefits of retained grade and pay due to a specific example set forth in statute or by invocation of implementing regulations promulgated by OPM." *Bosco* at 474.

We find, by analogy, that the fact that the appellants here received retained pay and grade benefits under the internal procedures of the agency, and not by statute, does not form a basis for jurisdiction. We note that under 5 U.S.C. § 5365, the Office of Personnel Management has specific authority to make regulations that extend the coverage of the statute's retained pay and grade provisions. We find that although the agency does not have specific statutory authority under 5 U.S.C. Chapter 53 to extend retained pay and grade benefits to its employees, its decision to grant equivalent or better benefits under the circumstances of these cases is consistent with section 5365 and the Office of Personnel Management's regulations. Moreover, because these appellants suffered no more harm than do appellants who receive their pay and grade retention directly under the statute and regulations, there is no

greater reason to allow appeals from them than from those similarly situated employees to whom such right is denied. *See Atwell v. Merit Systems Protection Board*, 670 F.2d 272 (D.C. Cir. 1981). The appellants have advanced no other theory of jurisdiction than that if they have no right to appeal to the Board they have no course of redress at all.

With regard to appellant Fowler's argument that she will have no course of redress if she is denied review by the Board, we find that this is an insufficient basis on which to accept the appeal because the Board may not assert jurisdiction that it does not have. *See Shaw*, 39 M.S.P.R. at 588-89.[8] *See also Wilson*, 807 F.2d at 1581, where the court

[8]Title 12 U.S.C. § 481 provides that the employment and compensation of OCC employees "... shall be without regard to the provisions of other laws applicable to officers or employees of the United States." *See also* 12 U.S.C. § 482. In funding its operations, OCC operates not on government funds but on non-appropriated funds from assessments it charges over 4,000 national banks under its supervision. *See, e.g.*, Petition for Review File, Tab 4, Docket No. DC07529110352. The legislative history of the FIRREA adds further validity to the proposition that the agency may fix the salaries of its employees without regard to other laws:

> The conferees emphasize that, while many of the activities of the OCC are subject to the general direction of the Secretary of the Treasury, all personnel-related matters including determinations regarding the number of employees to be hired, their pay status, and functions to be performed, are within the exclusive authority of the Comptroller to determine. ... (The exemption from Chapter 51 and subchapter 3 of Chapter 53 confirms OCC's current exclusion from these provisions based on its nonappropriated status).

H.R. CONF. REP. NO. 101-222, 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S. CODE CONG. & ADMIN. NEWS 457. We note that if the appellants were nonappropriated fund employees,

found that despite the fact that 5 U.S.C. Chapter 51, does not provide postal workers a right to appeal their classifications to OPM, the appellant's claim that he had been reduced in grade as a result of a postal service reclassification must be dismissed. *Cf.* United States v. Fausto, 484 U.S. 439 (1988)(holding that the Civil Service Reform Act of 1978 set a comprehensive scheme for reviewing actions of Federal agencies, and that if certain persons or acts are not covered by it, review in any forum is precluded).

Thus, we find that the Board lacks jurisdiction to consider these appeals. Because of this finding, we need not reach the other allegations raised by the appellants in their petitions for review with respect to the propriety of the agency's action.[9]

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the Board would have no jurisdiction over adverse actions affecting them. *See Taylor v. Department of the Navy*, 1 M.S.P.R. 591 (1980). We further note that in passing FIRREA, Congress acted on the basis of what it perceived to be an emergency situation, that the nation's thrift industry and its deposit insurance fund were in precarious financial condition, and were losing consumer confidence. H.R. REP. NO. 101-54(I), 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S. CODE CONG. & ADMIN. NEWS 302. While the legislative history makes no reference to a specific concern that the agency not be tied up before the Board defending its reclassification actions, it is at least indicative of Congress's intent to effectuate this legislation and the entire scheme it establishes expeditiously and with minimum interference.

[9]The appellant Fowler alleges that the administrative judge committed harmful adjudicatory error by not sustaining her claim that the agency improperly refused a discovery request. We find that the administrative judge properly denied her request based on his determination that this information directly related to the appellant's classification, and as such, it was an issue over which the Board lacked jurisdiction. *See Lomartere*, 4 M.S.P.R. at 32.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

for Robert E. Taylor
Clerk of the Board

Washington, D.C.